

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

10 HUIMIN SONG AND ANDY XIE ) Case No. 5:11-CV-04450-EJD  
11 Plaintiffs, )  
12 v. ) **ORDER GRANTING IN PART AND  
13 ) DENYING IN PART DEFENDANTS'  
14 ) MOTION FOR SUMMARY  
15 ) JUDGMENT AS TO PLAINTIFFS'  
16 ) FIRST CAUSE OF ACTION  
17 )  
18 ) Defendants. ) [Re: Docket Item No. 62]**

## I. INTRODUCTION

19 In this employment-related action brought by Plaintiffs Huimin Song (“Song”) and Andy  
20 Xie (“Xie”) (collectively “Plaintiffs”), presently before the Court is Defendants County of Santa  
21 Clara (“County”), David Manson (“Manson”), Sonia Valencia (“Valencia”), Ann Laborde  
22 (“Laborde”), and Terry Stavang’s (“Stavang”) (collectively “Defendants”) Motion for Summary  
23 Judgment. See Docket Item No. 62.

24 Pursuant to Civil Local Rule 7-1(b), the Court took the motion under submission without  
25 oral argument. Having fully reviewed the parties’ papers, the Court will grant in part and deny in  
26 part Defendants’ motion for the reasons stated below.

1           **II. BACKGROUND**

2           **A. Factual Background**

3           Plaintiffs are U.S. Permanent Residents, born in China, who worked as ultrasonographers at  
4           Santa Clara Valley Medical Centers (“SCVMC”) Echo-Cardiology Laboratory. Amended  
5           Complaint (“AC”), Docket Item No. 8 ¶¶ 7, 33, 37, 51. Song began working at SCVMC as an  
6           ultrasonographer in June 2001. Id. ¶ 14. Xie was hired as a full-time ultrasonographer in January  
7           2003. Id. ¶ 42. As ultrasonographers, Defendants are members of the Service Employees  
8           International Union 715 (“Union”) and their employment was governed by a Memorandum of  
9           Agreement (“MOA”) signed between the Union and the County on June 19, 2006. See Pineda  
10           Decl. ¶ 4, Docket Item No. 32.

11           Pursuant to the MOA between the County and the Union, Plaintiffs were paid one-half of  
12           their regular base rate for each hour of on-call duty and were not eligible for four-hour minimum  
13           overtime.<sup>1</sup> Dkt. No. 32 ¶ 4. To record callback time, Plaintiffs swiped their badges in and out for  
14           each callback and were paid for the exact hours worked. Dkt. No. 8 ¶¶ 66, 71. In 2009, Plaintiffs’  
15           lab was transferred to a new department with a new timekeeper and new payroll department. Id. ¶  
16           61. In February 2009, Defendant Valencia, the timekeeper for the department, and Defendant  
17           Laborde announced a new policy regarding callback pay. Id. ¶ 61. Plaintiffs were told that they  
18           would be paid a minimum of four hours for each time they were called back, even if the task for  
19           which they were called back took less than four hours to complete. Id.; Xie Decl., Docket Item No.  
20           41 ¶¶ 43-44. In April 2009, Plaintiffs were trained by Valencia to enter a new code when they  
21           reported for callback service, which would automatically record four hours of callback time,  
22           negating the need to swipe their badges at the exact time they entered and left the hospital because  
23           their pay was no longer based on the exact hours of callback work. Dkt. No. 8 ¶¶ 65, 72. Plaintiffs  
24           used this new code each time they were called back to the hospital and Valencia confirmed the new  
25           policy several times. Id. ¶¶ 45, 51-59.

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<sup>1</sup> The MOA defines on-call duty as “the requirement to remain immediately available to report for  
28           duty to perform an essential service when assigned by the appointing authority, subject to approval  
          by the County Executive.” Dkt. No. 32 ¶ 4.

1           Over a year later, in October 2010, the County stopped paying Plaintiffs the minimum four  
 2 hours of callback time. Dkt. No. 8 ¶¶ 67, 73. Valencia informed Plaintiffs that she had incorrectly  
 3 paid them for four hours of callback time and that the County would take money back from each  
 4 future paycheck for the erroneous callback time. Id. ¶ 73. On January 18, 2011, each Plaintiff  
 5 received a letter notifying them of the overpayments. Id. ¶¶ 74-75. Song was notified that she had  
 6 been overpaid \$68,383.74 for callback time; Xie was notified that he had been overpaid \$45,197.23  
 7 for callback time. Id. Plaintiffs were notified that pursuant to Section 7.6(c) of the MOA, their  
 8 overpayment amount would be deducted over the same number of pay periods during which the  
 9 error occurred. Id. ¶ 78. Section 7.6(c) provides: “Overpayment Errors: when a net one hundred  
 10 dollars or more to be repaid in the same amount and within the same number of pay periods in  
 11 which the error occurred.” Dkt. No. 23-1 at 1.

12           In January or February 2011, Xie filed a grievance with the Union for an incorrect amount  
 13 of overpayment. Dkt. No. 8 ¶ 75. Song filed a grievance in February or March 2011.<sup>2</sup> Id. ¶ 78.  
 14 Plaintiffs claim that because they did not clock in and out at the time they arrived and left for their  
 15 callback work after Valencia announced the new policy, the County could not have correctly  
 16 calculated the amount of overpayment. In April 2011, the County began deducting pay from  
 17 Plaintiffs’ paychecks. Id. ¶¶ 75-77; Song Decl., Docket Item No. 39 ¶ 59; Dkt. No. 41 ¶ 61.

18           On March 25, 2011, Plaintiff Song received a letter from the County denying her grievance.  
 19 Dkt. No. 8 ¶ 78. On April 11, 2011 and again on May 6, 2011, Plaintiffs met with the County’s  
 20 Labor Relations Representative, Pablo Pineda (“Pineda”), to discuss the overpayment. Id. ¶ 79;  
 21 Davis Decl., Docket Item No. 40 ¶ 3. In the meeting, Pineda told Plaintiffs that his authority was  
 22 only to set the amount to deduct from each pay period, not to change the total amount of  
 23 overpayment, and for the first time he provided Plaintiffs with documentation showing how the  
 24 County calculated the alleged overpayment. Dkt. No. 8 ¶¶ 79-80. Plaintiffs realized a discrepancy

25           <sup>2</sup> Plaintiff Xie’s Declaration states that the grievance was filed on February 15, 2011, while the AC  
 26 states it was filed in January 2011. Dkt. No. 41 ¶ 60. Plaintiff Song’s Declaration states that the  
 27 grievance was filed on February 15, 2011, while the AC states it was filed on March 25, 2011.  
 28 Dkt. No. 39 ¶ 58. Pineda states that Plaintiff Xie filed a grievance on February 15, 2011 and an  
 amended grievance on March 21, 2011 and that Plaintiff Song filed a grievance on February 15,  
 2011 and an amended grievance on March 21, 2011. Dkt. No. 23 ¶¶ 7-8.

1 existed between the County's records and the hours they actually worked. Id. ¶ 82. In the  
2 meetings, they presented documents they had prepared on this issue to Pineda, but he refused to  
3 review or accept the documents and did not provide a process for determining an accurate  
4 accounting of the overpayment. Dkt. No. 40 ¶¶ 4-8. Plaintiffs maintain that they have provided  
5 the County and the Union with evidence showing that overtime calculations are incorrect, but have  
6 been given no opportunity to dispute the incorrect amounts. Song Decl., Docket Item No. 72 ¶¶ 27,  
7 34, 36, 40-41, 50-51.

8 On May 16, 2011, Plaintiffs received a settlement agreement in which the County offered to  
9 take out a smaller amount per pay period over a longer period of time without changing the  
10 calculated overpayment. Dkt. No. 39 ¶ 8; Dkt. No. 41 ¶ 91. The agreement included clauses  
11 requiring Plaintiffs to withdraw their grievances, drop all claims against the County, and refrain  
12 from filing lawsuits. Dkt. No. 8 ¶ 86; Dkt. No. 39 ¶ 89; Dkt. No. 41 ¶ 92. Plaintiffs did not sign  
13 the agreement. Dkt. No. 8 ¶¶ 89-91.

14 After receiving the settlement agreement, Plaintiffs spoke with Defendant Laborde  
15 regarding the alleged miscalculations of overtime payments. Dkt. No. 41 ¶ 96. In April 2011,  
16 Laborde sent an email request to Pineda for re-evaluation of the total amount of overpayments.  
17 Dkt. No. 72 ¶ 59. On May 20, 2011, Laborde met with Director of Ambulatory Care David Wright  
18 ("Wright") regarding the overpayments. Dkt. No. 39 ¶ 98. Wright stated he would speak with  
19 Pineda's supervisor. Id.

20 In January 2012, the Union withdrew Plaintiffs' grievances. Dkt. No. 32 ¶¶ 7-8; Dkt. No.  
21 32-4. The Union stated that Plaintiffs had failed to provide it with documentation to support their  
22 claims and that in light of the civil action filed in this Court, the grievances had been withdrawn.  
23 Dkt. No. 32-5.

24 Plaintiffs repaid the overpayments in full over 43 pay periods between May 1, 2011 and  
25 December 9, 2012. See Torrey Decl., Docket Item No. 70. None of the individual Defendants  
26 were involved in the collection of the overpaid wages from Plaintiffs. See Valencia Decl. ¶ 2,  
27 Docket Item No. 64; Laborde Decl. ¶ 2, Docket Item No. 66; Manson Decl. ¶ 2, Docket Item No.  
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1 67; Stavang Decl. ¶ 2, Docket Item No. 69. In December 2012, Plaintiffs were put on  
2 administrative leave for pending investigations. Dkt. No. 39 ¶ 101; Dkt. No. 41 ¶ 103.

3 **B. Procedural Background**

4 Plaintiffs filed their Complaint on September 7, 2011 and their AC on December 19, 2011.

5 See Docket Item Nos. 1, 8. The AC contains the following nine causes of action: (1) violation of  
6 42 U.S.C. §1983 (violation of the Fifth and Fourteenth Amendments); (2) violation of 42 U.S.C.  
7 §1983 (violation of the First and Fourteenth Amendments through retaliation); (3) negligent  
8 misrepresentation; (4) negligent hiring, training, and retention; (5) intentional infliction of  
9 emotional distress; (6) nonpayment of wages; (7) supervisor liability; (8) public entity liability for  
10 failure to perform mandatory duties; and (9) common count services had and received.

11 On June 24, 2013, Defendants filed a Motion for Summary Judgment. See Docket Item  
12 No. 29. On November 23, 2013, the Court issued an Order granting Defendants' motion as to all  
13 causes of action except Plaintiff's First Cause of Action, as Defendants had failed to address the  
14 issue. See Docket Item No. 46. Defendants filed a Motion for Summary Judgment as to the First  
15 Cause of Action on December 11, 2013. See Dkt. No. 62. Plaintiffs filed an Opposition to  
16 Defendants' motion on December 16, 2013. See Docket Item No. 71.

17 **II. LEGAL STANDARD**

18 A motion for summary judgment should be granted if "there is no genuine dispute as to any  
19 material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);  
20 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the  
21 initial burden of informing the court of the basis for the motion and identifying the portions of the  
22 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the  
23 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

24 If the moving party meets this initial burden, the burden then shifts to the non-moving party  
25 to go beyond the pleadings and designate specific materials in the record to show that there is a  
26 genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. The court must draw all  
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1 reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita  
2 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

3 However, the mere suggestion that facts are in controversy, as well as conclusory or  
4 speculative testimony in affidavits and moving papers, is not sufficient to defeat summary  
5 judgment. See Thornhill Publ'g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the  
6 non-moving party must come forward with admissible evidence to satisfy the burden. Fed. R. Civ.  
7 P. 56(c); see Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

8 A genuine issue for trial exists if the non-moving party presents evidence from which a  
9 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the  
10 material issue in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986);  
11 Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment must  
12 be granted where a party “fails to make a showing sufficient to establish the existence of an  
13 element essential to that party’s case, on which that party will bear the burden of proof at trial.”  
14 Celotex, 477 U.S. at 322.

### 15 III. DISCUSSION

16 Plaintiffs assert that Defendants “took” Plaintiffs’ money without due process of law and  
17 thus violated Plaintiffs’ rights under the Fifth and Fourteenth Amendments. Thus, Plaintiffs assert  
18 that Defendants are liable under 42 U.S.C. § 1983.

19 Liability under 42 U.S.C. § 1983 requires that an “action pursuant to official municipal  
20 policy of some nature cause[s] a constitutional tort.” Monell v. Dep’t of Soc. Servs. of City of  
21 N.Y., 436 U.S. 658, 691 (1978). A plaintiff must “demonstrate that, through its deliberate conduct,  
22 the municipality was the ‘moving force’ behind the injury alleged.” Bd. of Cnty. Comm’rs of  
23 Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 404 (1997) (emphasis in original). Thus, to establish a  
24 claim under Section 1983, a plaintiff must prove either (1) a municipal employee “committed the  
25 alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice  
26 or custom,” (2) “the individual who committed the constitutional tort was an official with ‘final

1 policy-making authority,”<sup>3</sup> or (3) “an official with final policy making authority ratified a  
2 subordinate’s unconstitutional decision or action and the basis for it.” Gillette v. Delmore, 979  
3 F.2d 1342, 1346-47 (9th Cir. 1992).

4 To start, the Fifth Amendment only applies to federal government action, and thus is  
5 inapplicable to the present case. See Bingue v. Prunchak, 512 F.3d 1169, 1174 (9th Cir. 2008)  
6 (citation omitted) (“The Fifth Amendment prohibits the federal government from depriving persons  
7 of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due  
8 process by the several states.”). Thus, the Court grants summary judgment with respect to  
9 Plaintiffs’ First Cause of Action as it relates to the Fifth Amendment.

10 Further, there is no evidence that the individually named Defendants – Manson, Valencia,  
11 Laborde, and Stavang – took wages from Plaintiffs. As such, they are entitled to summary  
12 judgment on the First Cause of Action.

13 As to the Fourteenth Amendment, which applies to state action, the Court will analyze  
14 Plaintiffs’ claim. Plaintiffs claim that the County collected overpayments in an improper way, in  
15 incorrect amounts, without verifying the correct amounts, without reviewing evidence provided by  
16 Plaintiffs, without due process, and without the agreement of Plaintiffs. Plaintiffs claim a  
17 discrepancy between the time records kept by the County and the actual hours they worked, as a  
18 result of using the timekeeping protocol in which they were trained by Defendant Valencia. They  
19 state that in their meetings with Pineda, a County employee who acted as the Labor Relations  
20 Representative, Pineda claimed he had no authority to review the total amount requested by the  
21 County and he did not agree to recalculate the amount of overpayment. Plaintiffs allege that the  
22 County’s policy of overpayment collection does not afford employees an opportunity to present  
23 evidence to dispute an alleged overpayment, which violates their right to due process.

24 The County has a policy to recoup overpaid wages, as outlined in the MOA between the  
25 County and Plaintiff’s Union. And while this Court has previously articulated that there is nothing  
26 inherently unlawful about the recoupment of overpaid wages, there is definitely the possibility of

27 3 “Whether a particular official has final policy-making authority is a question of state law.”  
28 Gillette, 979 F.2d at 1346.

1 violation if the County, pursuant to this policy, is taking more than it actually overpaid its  
2 employees.

3 Courts analyze a due process claim in two steps. They must decide (1) “whether the  
4 interest asserted rises to the level of ‘liberty’ or ‘property’ protected by the Fifth and Fourteenth  
5 Amendment” and, if so, (2) “what process is due.” Tur v. F.A.A., 4 F.3d 766, 769 (9th Cir. 1993)  
6 (citation omitted). Public employers may meet the obligation to provide due process through  
7 grievance procedures established in a collective bargaining agreement, if those procedures satisfy  
8 due process. Armstrong v. Meyers, 964 F.2d 948, 950 (9th Cir. 1992). Court generally consider  
9 three factors to determine whether due process has been satisfied: the private interest affected by  
10 the official action, the risk of erroneous deprivation of such an interest through the procedures and  
11 the probable value of additional or substitute procedural safeguards, and the government’s interest.  
12 Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The private interest affected is great, as it  
13 involves Plaintiffs’ earned wages and property. While in general, courts recognize that there is a  
14 low risk of erroneous deprivation in grievance procedures, in this case the Court determines that  
15 there is an issue of triable fact about whether the grievance procedure met the standards of due  
16 process as applied to the Plaintiffs. See Armstrong, 964 F.2d at 950. Both Plaintiffs and Emma  
17 Davis, the Chief Union Steward for the Union, declare that Plaintiffs were not given an opportunity  
18 to be heard regarding the correct amount of overpaid wages. Finally, while the government has a  
19 significant interest in collecting overpaid wages, its interest is only in collecting the correct amount  
20 of overpaid wages. Plaintiffs are not asking the government not to collect overpaid wages, rather  
21 only to collect those wages which were actually overpaid. As such, the Court denies summary  
22 judgment on this cause of action.

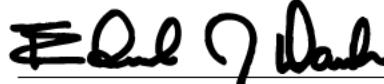
23 **IV. CONCLUSION**

24 Based on the foregoing, Defendants’ Motion for Summary Judgment on Plaintiffs’ First  
25 Cause of Action is GRANTED in part as to claims arising from the Fifth Amendment and as to the  
26 individually named Defendants and DENIED in part as to the claim arising from the Fourteenth  
27 Amendment.

1 A Preliminary Pretrial Conference is scheduled for 11:00 am on October 3, 2014. The  
2 parties shall submit a Joint Preliminary Pretrial Conference Statement on September 23, 2014.  
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4 **IT IS SO ORDERED**

5 Dated: August 28, 2014

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EDWARD J. DAVILA  
United States District Judge